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Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

No. 93-1690

In The

Supreme Court of the United States

October Term, 1993

JEFFREY D. SCOTT,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari To the Alaska Court of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Should this Court decline to exercise its powers of discretionary review because Scott is asking for a remand to make a factual showing Scott failed to make in the first instance?

2. Does the district court of the State of Alaska have jurisdiction over a criminal prosecution of a non-Indian for an offense committed on village corporation lands?

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AUTHORITIES RELIED UPON

Statutes

43 United States Code § 1603(b) provides:

> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

Alaska Statute 16.05.925 provides:

> Except as provided in AS 16.05.430, 16.05.722, 16.05.723, 16.05.831, and 16.05.860, a person who violates AS 16.05.920 or 16.05.921, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor.

Rule

Alaska Rule of Criminal Procedure 35.1 provides:

> *Post Conviction Procedure.*
>
> (a) *Scope.* Any person who has been convicted of, or sentenced for, a crime and who claims;
>
> (1) that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of Alaska;
>
> (2) that the court was without jurisdiction to impose sentence;
>
> (3) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
>
> (4) that there exists evidence of material facts, not previously presented

and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) that his sentence has expired, his probation, parole or conditional release have been unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; or

(7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standards;

may institute a proceeding under this rule to secure relief.

(b) *Not a Substitute for Remedies in Trial Court -- Replaces All Other Remedies for Challenging the Validity of a Sentence.* This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. It is intended to provide a standard procedure for accomplishing the objectives of all of the constitutional, statutory or common law writs.

(c) *Commencement of Proceedings -- Filing -- Service.* A proceeding is commenced by filing an application with the clerk of the court in which the conviction occurred. Application forms will be furnished by the clerk of court. An application amy be filed at any time. The clerk shall open a new file for the application, promptly bring it to the attention of the court and give a copy to the district attorney.

(d) *Application -- Contents.* The application shall (1) identify the proceedings in which the applicant was convicted, (2) state the date shown in the clerk's certificate of distribution on

the judgment complained of, (3) state the sentence complained of and the date of sentencing, (4) specifically set forth the grounds upon which the application is based, and (5) clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be under oath. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence. Argument, citations and discussion of authorities are unnecessary. Applications which are incomplete shall be returned to the applicant for completion.

(e) *Indigent Applicant.* If the applicant is indigent, filing fees, transcript and other court costs shall be borne by the state. Where the court determines that the application shall not be summarily disposed of on the pleadings and record pursuant to subdivision (f) of this rule, but that the issues raised by the application require an evidentiary hearing, counsel shall be appointed to assist indigent applicants.

(f) *Pleadings and Judgments on Pleadings.*

(1) Within 30 days after the filing of the application, or within such further time as the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application the court shall consider substance and disregard defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.

(2) When the court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record shall not be made when a material issue of fact exists.

(3) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

(g) *Hearing -- Evidence -- Order.* The application shall be heard in, and before any judge of, the court in which the conviction took place. An electronic recording of the proceeding shall be made. All rules and statutes applicable in civil proceedings, including pre-trial and discovery procedures are available to the parties. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. The court may order the applicant brought before it for the hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The order made by the court is a final judgment.

(h) *Waiver of or Failure to Assert Claims.* All grounds for relief available to an applicant under this rule must be raised in his

> original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Other

5 Alaska Administrative Code 92.140(a) provides:

> No person may possess, transport, give, receive, or barter game or parts of game that the person knows or should know were taken in violation of AS 16 or a regulation adopted under AS 16.

STATEMENT OF THE CASE

Statement of Facts

On May 7, 1992, the Alaska State Troopers received an anonymous tip that two people, one a Caucasian male named "Jeff" and the other a juvenile, were unloading a moose from a truck at a residence in Northway, Alaska.[1] The residence belonged to the father of the woman with whom Jeffrey Scott was living. There was no open season for the taking of moose at the time. The truck was described as a small navy blue pickup, possibly a Ford.

On May 8, two troopers went to the residence. Inside, they were introduced to Scott. Scott agreed to talk to the troopers. He admitted that he (Scott) had been present when a juvenile killed the moose and that he transported the carcass in his blue pickup truck.

Statement of Proceedings

Scott was charged in Alaska district court with unlawful possession of game moose under 5 AAC 92.140(a), a class A misdemeanor offense. *See* AS 16.05.925. Scott moved to dismiss the case, arguing that the state court did not have jurisdiction over the prosecution. According to Scott, the moose had been taken in Indian Country where the state lacked the authority to manage hunting. Scott did not establish, with any precision, where the moose had been killed, although the state did not dispute Scott's assertion that it had been taken on land owned by

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[1] Northway is an Alaska Native village recognized in the Alaska Native Claim Settlement Act. *See* 43 U.S.C. § 1610(b)(1).

Northway, Inc.[2] In addition, Scott offered no evidence that the land on which moose had been taken constituted Indian Country. The district court denied the motion.

Scott entered a no contest plea, reserving his right to appeal the jurisdictional issue. The district court suspended imposition of sentence conditioned upon Scott's payment of a $250 fine and performance of twenty hours of community work service.

Scott appealed to the Alaska court of appeals. His conviction was affirmed. *Scott v. State*, Mem. Op. No. 2815 (Alaska App. November 24, 1993). Scott's petition for hearing to the Alaska Supreme Court was denied in an unpublished order, dated January 24, 1994. His petition to this Court followed.

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[2] Northway, Inc. is a village corporation organized under Alaska law pursuant to ANCSA. *See* 43 U.S.C. § 1607. It is a separate and distinct entity from the Village of Northway.

REASONS FOR DENYING THE WRIT

I. Introduction and summary

It is important to recognize at the outset some important facets of this case. Nor does it involve the right of an Alaska Native to hunt on Native land. It does not involve enforcement of regulations promulgated by an Alaska Native group to control hunting on their land. Who killed the moose and when are not at issue. This case involves the possession by a non-Native of freshly killed moose meat at a time when there was no open season on moose.

Scott failed to present factual evidence supporting his claim that his conduct was subject to control by a sovereign authority other than the state. The Village of Northway does not have sovereign jurisdiction over this case as a matter of law. If such authority ever existed, it was extinguished by Congress in the Alaska Native Claims Settlement Act. Even if the village has inherent sovereign authority over this case, it does not exist in a vacuum. The state retains concurrent jurisdiction over the taking of game on village lands until such time as the village exercises whatever power it might have to establish its own regulatory scheme.

II. Argument

1. Scott is asking this Court to consider matters not presented to the trial court

Scott seeks to persuade this Court that Northway constitutes Indian Country by citing the Department of Interior's notice formally recognizing the village as an Indian tribe. (Pet. Br. at 16-17) This departmental action took place on October 15, 1993, during the pen-

dency of Scott's appeal to the Alaska Court of Appeals, and was never presented to the state trial court. Documents and exhibits which have not been filed in the trial court are not part of the appellate record and may not be considered on appeal. *United States v. Sanga*, 967 F.2d 1332, 1336 n.2 (9th Cir. 1992). Therefore, the Department of Interior notice should not be considered by this Court.

Scott is not left without remedy regarding new matters coming to light after his conviction. Alaska Criminal Rule 35.1 permits a defendant to petition the district court for relief for a variety of reasons, including "that the court was without jurisdiction to impose sentence." Rule 35.1(a)(2), Alaska R. Cr. P. If Scott wishes to make a factual record, he should avail himself of this remedy.

2. Scott presented no evidence that the Native Village of Northway had the sovereign power of his conduct

Scott's motion in the district court cited a host of secondary authorities, repeated in his petition, which he claimed support the conclusion that the Village of Northway has sovereign jurisdiction over this case. (*See* Appendix, *infra*, A-4 - A-5.) But he did not present any affidavits from expert or lay witnesses to establish the factual basis for his sovereignty claim. Moreover, allegations in motion papers and affidavits, although sufficient to raise an issue, are not the competent proof necessary to support the motion. *See Cohen v. United States*, 378 F.2d 751, 761 (9th Cir.), *cert. denied*, 389 U.S. 897, 88 S.Ct. 217, 19 L.Ed.2d 215 (1967).

Scott, by relying entirely on secondary authorities, rather than presenting affidavits, cast the issue as a legal, not a factual, matter.

Having elected to present no *evidence* in the state trial court supporting his claim that the Village of Northway had sovereign jurisdiction, Scott should not now be heard to complain that the trial court applied the wrong standard or that he was precluded from presenting evidence.

Scott asks this Court to reverse his conviction and to remand his case to enable the trial court to make a factual inquiry into the sovereignty issue. (Pet. Br. at 15) However, he has already had the opportunity to make a factual record below, but did not do so. Under these circumstances this Court should not exercise discretionary review, particularly when there is a state procedure available that would enable Scott to present the factual basis for his claim. *See* Rule 35.1, Alaska R. of Cr. P.

3. The Village of Northway does not have sovereign power over hunting on land owned by Northway, Inc.

Scott asserts that he could not be prosecuted in state court for a criminal offense that allegedly took place on land owned by a Native village corporation created pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601, *et seq.* According to Scott, his conduct which is the focus of this case took place on land owned by Northway, Inc., a corporation established under ANCSA. This land, Scott reasons, constitutes Indian Country over which the Native Village of Northway has sovereign jurisdiction. His petition lays out an essentially procedural argument claiming that the state court failed to make the factual inquiry and enter appropriate findings regarding whether the village is an Indian tribe with sovereign jurisdiction over game resources on its lands. *See Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635

(9th Cir. 1992) (trial court must make factual findings to support conclusion the Native village was Indian tribe protected by sovereign immunity). Scott ignores that as a purely legal matter Congress divested the village of whatever sovereign control over game resources it might have had.

This Court, in *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), recognized that the sovereignty possessed by Indian tribes "exists only at the sufferance of Congress and is subject to complete defeasance." *Id.* at 323, 98 S.Ct. at 1086. *See also Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955). Thus, Congress has the power to limit or entirely eliminate an Indian tribe's sovereign rights. Congress has done exactly this with respect to Alaska Native sovereign rights over game resources.

In 1971 Congress enacted and the President signed into law ANCSA. In section 4(b), Congress stated:

> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including *any aboriginal hunting or fishing rights that may exist, are hereby extinguished.*

43 U.S.C. § 1603(b) (emphasis added). The Ninth Circuit Court of Appeals confirmed that this provision extinguished aboriginal hunting and fishing rights in Alaska. *People of Village of Gambell v. Clark*, 746 F.2d 572, 574 (9th Cir. 1984), *rev'd sub nom. on other grounds, Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (holding ANCSA did not extinguish aboriginal rights on the outer continental shelf); *see also United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134 (9th Cir.) (ANCSA extinguished not

only aboriginal title, but claims based on aboriginal title), *cert. denied*, 449 U.S. 888, 107 S.Ct. 243, 66 L.Ed.2d 113 (1980); *cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (hunting rights preserved under treaty not extinguished by termination act). It is axiomatic that, by extinguishing Alaska Natives' aboriginal hunting rights, ANCSA terminated Native sovereign power to regulate hunting on the lands granted to Natives under the act.

In view of the Congressional extinguishment of Alaska Native sovereign power over hunting on Native land, Scott's jurisdictional claim fails as a matter of law. Consequently, remanding this case for further factual findings is unnecessary.

4. Recognition of Native sovereignty in this instance would create a law enforcement vacuum

Assuming that the Village of Northway has sovereign power over hunting and fishing on lands owned by Northway, Inc., there is no basis for concluding that state lacks concurrent jurisdiction to apply state hunting laws to non-Natives. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983), this Court held that state hunting and fishing laws were pre-empted on the reservation of the Mescalero Apache Tribe. The tribe, in conjunction with the federal government, had implemented a comprehensive fish and game management program. The government operated a fish hatchery, stocked artificial lakes with fish, donated a herd of elk, and assisted the tribe in formulating hunting and fishing ordinances which were subject to approval by the Secretary of the Interior. The tribe's authority to regulate fish and game pre-empted the state's jurisdiction because concurrent state

jurisdiction would: (1) nullify tribal authority; (2) thwart the comprehensive management scheme established by the tribe with the participation in conjunction with the government; (3) disrupt the tribe's ability to conduct a sound management program; and (4) contravene Congress' objective of promoting tribal self-government and economic development. 462 U.S. at 338-41, 103 S.Ct. at 2388-90. None of these elements are present in this case.

The record is devoid of any evidence that Northway, Inc. or the Native Village of Northway have developed and implemented any game management scheme, comprehensive or otherwise.[3] No such scheme exists in or around Northway. Moreover, there is no evidence that they have done anything in the exercise of tribal authority over fish and game. Here, in contrast to *Mescalero*, there is no tribal authority that would be nullified, no management scheme that would be thwarted, and no Congressional purpose that would be contravened by enforcement of state law against this defendant.

The conclusion that the state can exercise its jurisdiction in this case finds additional support in the Ninth Circuit Court of Appeals' decision in *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976). The court there held that state game laws could be applied to the

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[3] Similarly, Scott's reliance on *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d (1987), is somewhat misplaced. (*See* Pet. Br. at 12 note 8) The absence of a tribal regulatory scheme also distinguishes Scott's case from *Cabazon*. Apart from the fact that the *Cabazon* Court was dealing with activities on a reservation, it held that state laws regarding gambling could not apply within reservations where the tribes had enacted federally approved ordinances authorizing gambling. The Court may well have reached a different result if the issue before it had been the enforcement of state gambling regulation against a non-Indian in the absence of any tribal ordinances.

activities of non-Indians on an Indian reservation where such application was not precluded by federal law and it would not interfere with tribal self-government on the reservation. *Id.* at 1089 (quoting *State ex rel. Nepstad v. Danielson*, 427 P.2d 689, 692-93 (Mont. 1967)). Scott has cited no federal law precluding enforcement of state law in his case and has never argued, either here or below, that application of state law to him would interfere with tribal self-government.

Reduced to its essence, the recognition of an exclusive Native sovereign right to regulate hunting in this instance would effectively create a regulatory vacuum in the Village of Northway where no law regulating the hunting would exist. *Mescalero* should not be applied in this vacuum. The direct result of sovereign recognition *in this case* would be the creation of an enclave where there is no regulation of hunting whatsoever. Consequently, even if the Village of Northway is deemed sovereign power over hunting on village corporation land, the State of Alaska should be deemed to have concurrent jurisdiction until the village develops and implements its own game management and regulatory scheme.

Scott also claims that "P.L. 280 specifically confirms the power of tribes to regulate on-reservation hunting and fishing." (Pet. Br. at 12) Presumably, he is referring to 18 U.S.C. § 1162(b) which provides that state jurisdiction over criminal matters involving Indians or taking place in Indian Country may not "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity *afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.*" (Emphasis added.) Scott fails to explain how enforcement of state law

against him deprives the Northway Natives of any right, privilege, or immunity afforded under a federal treaty, agreement, or statute. The state is not aware of any such law.

CONCLUSION

Scott has not presented an adequate basis upon which this Court should exercise its power of discretionary review. Accordingly, his petition should be denied.

Respectfully submitted this 6th day of July, 1994.

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